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In the Supreme Court of the United States

OCTOBER TERM, 1929

PERCIVAL E. MAGEE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 761

PERCIVAL E. MAGEE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition.

The petition presents an important question on which there is a conflict of authority. That question is the same as that involved in *Graham and Foster, Co-partners, etc.* v. *Goodcell, Collector,* No. 589, October Term, 1929, writ of certiorari granted March 3, 1930, which is now before this Court. Both cases involve the question whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 14–15) should be construed to deprive the petitioner of the right which he otherwise would have had to recover taxes which had been collected after the statutory period of limita-

tion had expired, and if so construed, whether it is in violation of the Fifth Amendment.

The pertinent dates are as follows (R. 6, 10, 11):

February 27, 1917, return for 1916 filed.

February 27, 1920, expiration of three-year period for assessment of tax.

October, 1921, additional assessment made.

November 15, 1921, claim in abatement filed.

February 27, 1922, expiration of five-year period for assessment and collection of tax.

February 12, 1924, claim in abatement partially rejected.

May 23, 1924
June 17, 1924 } tax collected.
July 11, 1925

December 12, 1927, claim for refund filed.

The Court of Claims in an opinion (R. 12) reported in 37 F. (2d) 763, in accord with the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, 35 F. (2d) 586, *supra*, decided that Section 611 of the Revenue Act of 1928 barred recovery in this case. The position of the United States is supported by three other decisions of the Court of Claims. *Oak Worsted Mills* v. *United States*, 36 F. (2d) 529; *Gotham Can Co.* v. *United States*, 37 F. (2d) 793, petition for certiorari filed April 21, 1930 (No. 832, October Term, 1929), and *Taft Woolen Co.* v. *United States*, decided March 3, 1930.

The further question raised by the petition for certiorari, we submit, does not warrant the consideration of this Court. The petitioner argues that the assessment of the tax more than three but less than five years from the date of the return was illegal under the provisions of Section 9 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 763. But even if this section did establish a three-year limitation on assessment, as petitioner contends, it was superseded by Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, which applies retroactively to validate just such an assessment:

> (d) *The amount of income,* excess-profits, or war-profits *taxes due* under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or *under prior income,* excess-profits, or war-profits tax *Acts,* or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, *shall be determined and assessed within five years after the return was filed,* unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax: * * *. (Italics ours.)

Congress has here expressly made the five-year period for assessment apply to taxes due under prior Income Tax Acts, including those due under the Revenue Act of 1916. The fact that the assessment was made in October, 1921, before the passage of the Revenue Act of 1921 on November 23, 1921, does not seem to be material. Section 263 of the Act expressly provides that Title II, including Section 250, "shall take effect as of January 1, 1921."

We submit that the decision of the Court of Claims upon this further point was correct. See *Campbell* v. *Holt,* 115 U. S. 620. There is no conflict of authority upon this question. We suggest that the Court limit its review to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Respectfully submitted.

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